

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM GEORGE VONRUSTEN,

Defendant-Appellant.

UNPUBLISHED

November 26, 2002

No. 234435

Macomb Circuit Court

LC No. 00-002632-FH

Before: Jansen, P.J., and Holbrook, Jr., and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for soliciting to deliver a controlled substance, MCL 333.7407a; MCL 333.7401(2)(a)(iv). Defendant was sentenced to lifetime probation with the first ten months to be served in the Macomb County Jail. We affirm.

Defendant's issue on appeal is that he was denied effective assistance of counsel. We disagree. Defendant did not move for a new trial, nor did he seek an evidentiary hearing before the trial court, and thus, the issue was not properly preserved. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Therefore, we must review this issue on the basis of the existing record. *Id.* at 443; *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

"To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the fact finder would not have convicted the defendant." *People v Pickens*, 446 Mich 298, 329; 521 NW2d 797 (1994); *Snider, supra* at 423. The deficiency must be prejudicial to the defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Additionally, the defendant must overcome the presumption that the challenged action is sound trial strategy. *Id.* at 58. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant alleges that defense counsel failed to provide effective assistance of counsel by not presenting evidence, or by failing to call witnesses, that would impeach Sergeant Lance Folson, and at the same time, bolster defendant's credibility with respect to whether the Performance Bar was open. This argument lacks merit. Defendant is correct in pointing out that the prosecution's case hinged on the credibility of the testimony of Sergeant Folson and defendant. On redirect examination, Sergeant Folson testified that the Performance Bar was not open for business on July 21, 2000. However, this was in conflict with the testimony of defense

witness, Patrick McKay, who testified that he was sure that the Performance Bar was open on July 21, 2000, which supported defendant's testimony that he was working at the Performance Bar that night. Viewing the existing record, defense counsel did present evidence that the Performance Bar was open on July 21, 2000, in the form of testimony from McKay and defendant.

The testimony of McKay, combined with that of defendant, was used to prove that the Performance Bar was open on July 21, 2000. Defense counsel did not submit any further evidence to rebut the testimony of Sergeant Folson that the Performance Bar was closed for business on July 21, 2000. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of defense counsel on matters of trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). The fact that the strategy chosen by counsel did not succeed does not constitute ineffective assistance of counsel. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000).

It may have been defense counsel's strategy not to admit further evidence, which may be considered cumulative, and therefore, such action cannot be second-guessed on appeal. *Pickens*, *supra* at 344. There is nothing in the record to overcome the presumption that this was trial strategy by defense counsel. Moreover, not presenting further evidence to rebut Sergeant Folson's testimony, when such evidence had already been presented, did not transform the lower court proceedings into an unfair trial for defendant, and defendant was not deprived of a substantial defense. Also, effective assistance of counsel is presumed, and defendant has not overcome this presumption.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Jessica R. Cooper